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IN THE

Supreme Court of the United States

CAREY D. EBERT, AS TRUSTEE IN BANKRUPTCY FOR GRAVITY, INC., AND MARK H. DICKSON,
Petitioners,

v.

MICROSOFT CORPORATION, COMPAQ COMPUTER CORPORATION, DELL COMPUTER CORPORATION, AND PB ELECTRONICS, INC. (F/K/A PACKARD BELL NEC, INC.),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. Whether distributors who entered into anticompetitive agreements with a manufacturer, having knowledge that other competing distributors were entering similar anticompetitive agreements with that same manufacturer, thereby joined a single, "hub-and-spoke" antitrust conspiracy.

2. Whether the fundamental notice pleading standards just reaffirmed by this Court in *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002), permit a court to disregard the relevant markets alleged and require a plaintiff to plead specific facts supporting anticompetitive effect.

3. Whether the *indirect* purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which bars antitrust damage suits against a manufacturer by customers of that manufacturer's distributors, should apply where the manufacturer and its distributors unlawfully conspired to restrain competition, thus making the plaintiff-customer a *direct* purchaser from the conspiracy.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Carey D. Ebert, as Trustee in Bankruptcy for Gravity, Inc., states the following:

Gravity, Inc. is neither a publicly owned corporation nor a subsidiary or affiliate of a publicly owned corporation.

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PETITION FOR A WRIT OF CERTIORARI

Carey D. Ebert, as Trustee in Bankruptcy for Gravity, Inc., and Mark H. Dickson (collectively "Gravity") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

The divided panel's affirmance of the district court's dismissal of Gravity's class action complaints presents three inter-related issues of exceptional importance to the sound administration of the antitrust laws, which this Court should resolve. The panel majority's erroneous resolution of each of these issues affects millions of consumers nationwide who purchased software made by defendant Microsoft Corporation that was distributed with a computer sold by one of the three defendant computer makers – Compaq Computer Corporation ("Compaq"), Dell Computer Corporation ("Dell"), and PB Electronics, Inc. ("PB") (original equipment manufacturers, or

"OEMs"). If not corrected, these errors also promise to infect many subsequent antitrust cases.

First, the divided Fourth Circuit panel parted ways with the Sixth and Eighth Circuits in holding that allegations of a single conspiracy between a "hub" (Microsoft) and several "spokes" (the OEM defendants) cannot state a claim under Sherman Act §§ 1 and 2. That holding conflicts, moreover, with several decisions of this Court establishing that those who enter a conspiracy with a common "hub," having knowledge that other "spokes" are likewise involved with that hub, are jointly liable in a single conspiracy.

Second, in disregarding the relevant software markets in this case and requiring the complaint to state specific facts supporting an allegation of market power in the computer market, the panel majority disregarded fundamental notice pleading standards just reaffirmed by this Court in *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002). In any case, Gravity did allege facts demonstrating actual anticompetitive effects in the relevant software markets.

Third, the panel majority parted ways with unanimous precedent from three circuits holding the indirect purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), inapplicable to allegations of a vertical conspiracy. In doing so, the panel majority fundamentally undermined the deterrence rationale underpinning *Illinois Brick*, where this Court found that direct purchasers from a manufacturer would generally have the most incentive to sue that manufacturer for an antitrust violation. That reasoning fails once the so-called direct purchaser joins with the manufacturer in an antitrust conspiracy, and the panel majority erred in not holding that the consumer plaintiffs here were direct purchasers *from the conspiracy*.

The cumulative effect of these three decisions is to deal a severe blow both to consumers' rights to recover for damages sustained in software markets and to incentives

for upstart software makers to innovate in competition with Microsoft. As Judge Gregory's dissent concluded:

> The most unfortunate aspect of this case is that, to the extent Gravity's claims have merit, consumers will be left uncompensated. Even more, raising the procedural bar for consumers' claims may further stifle technological innovation. By giving comfort to those entrenched interests that seek to protect the status quo, today's decision increases the likelihood of future anticompetitive conduct. To those who would introduce disruptive technologies, this ruling creates a strong disincentive to innovate. Without innovation, we all lose.

Pet. App. 45a.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 309 F.3d 193. The opinions of the district court (Pet. App. 46a-56a, 57a-64a) are reported at 127 F. Supp. 2d 728 and 168 F. Supp. 2d 541, respectively.

JURISDICTION

The court of appeals entered its judgment on October 28, 2002, and denied a petition for rehearing and rehearing *en banc* on December 19, 2002. Pet. App. 65a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, are reproduced at Pet. App. 66a.

STATEMENT

In the government's case against Microsoft, the unanimous, *en banc* D.C. Circuit held that Microsoft had violated the antitrust laws, *inter alia*, through a series of unlawful, exclusionary licensing agreements with computer makers that protected Microsoft's "Windows" operating system monopoly from competition. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (*per curiam*) ("*Microsoft*"), *cert. denied*, 122 S. Ct. 350 (2001). The point of these agreements, as the D.C. Circuit recognized,

was that Microsoft could not effectively exclude rival operating systems on its own, so it either "hired" for monetary or in-kind compensation or coerced the largest OEMs to assist its anticompetitive schemes.

Gravity brought this consumer class action challenging antitrust conspiracies between Microsoft and the three largest (and most culpable) OEMs – Compaq, Dell, and PB – to limit competition and to maintain Microsoft's monopolies in operating system software, word processing software, and spreadsheet software. These combinations, which violated Sherman Act §§ 1 and 2, are demonstrated by a series of agreements between Microsoft and the OEMs. Gravity has sought to represent classes of the customers of the OEM defendants. Microsoft, an undisputed monopolist in each of the relevant software markets, joined together with the OEM defendants to fend off potential threats to its monopolies from competing software and new computing platforms that could completely replace Microsoft software. These conspiracies have denied customers of the named OEMs competitive software prices and the choice of competitive software products.

The D.C. Circuit unanimously held that many of the exclusionary agreements on which Gravity relies were "anticompetitive" and "unredeemed by any legitimate justification" within the standards of § 1, and thus supported a finding that Microsoft violated § 2 by entering them with OEMs. *Microsoft*, 253 F.3d at 61-64. The court focused on Microsoft's end of these unlawful licensing agreements because the government's central claim was for § 2 monopoly maintenance against Microsoft alone. But the court's conclusion that these agreements themselves constituted stand-alone § 1 violations provides strong support for Gravity's allegations that they violated § 1, not just for Microsoft, but also for the OEM defendants – whose help Microsoft needed to (and did) obtain in order to maintain its monopolies.

Gravity filed this case nine months before the district court issued its findings of fact in the government's case,

see United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) ("*Microsoft Findings of Fact*"), *aff'd in relevant part and rev'd in part, Microsoft*, 253 F.3d 34, and 10 months or more before numerous other federal and state cases based on those findings were begun. The government's case sought only injunctive relief against Microsoft – but did not seek the damages necessary to compensate millions of injured consumers.

The D.C. Circuit noted that such injunctive "[c]onduct remedies may be unavailing in [computer software industry] cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless). And broader structural remedies (such as a break-up of Microsoft) present their own set of problems, including how a court goes about *restoring* competition to a dramatically changed, and constantly changing, marketplace." *Microsoft*, 253 F.3d at 49. Accordingly, "the threat of private damage actions will remain to deter those firms inclined to test the limits of the law" and to redress the past harm done to consumers. *Id.*

Thus, private damage actions such as Gravity's "are an important element of the Nation's antitrust enforcement effort: Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) (internal quotation marks omitted).

1. Microsoft has maintained a monopoly in the operating system software market for Intel-compatible personal computers ("PCs") through its ubiquitous Windows software, which has gained more than 95% market share. *See Microsoft*, 253 F.3d at 51-58. Operating systems function as platforms for software applications such as word processing and spreadsheet programs. "They do this by

'exposing' – *i.e.*, making available to software developers – routines or protocols that perform certain widely-used functions . . . known as Application Programming Interfaces, or 'APIs.' " *Id.* at 53. "For example, Windows contains an API that enables users to draw a box on the screen," which software developers can use rather than duplicating it in their own code. *Id.*

Microsoft's monopoly power reflects that the market for software is characterized by substantial economies of scale: once software is written, copies can be produced very cheaply. There are also significant network effects, whereby one product or standard tends toward dominance because consumer benefits increase as others adopt and use it. For example, benefits to telephone users increase with the number of other users with whom they can communicate on the telephone network. Likewise, PC users generally prefer operating software for which there are a high number, variety, and quality of software applications; application developers, in turn, make their programs compatible with the most commonly used operating software in order to appeal to the greatest number of potential customers. *See id.* at 49, 55. Microsoft thus enjoys the protection of a significant "applications barrier to entry" that restrains its competition. *Id.* at 55.[1]

Microsoft saw the need, however, to enlist its largest OEM partners to help preserve this barrier against challenges from competing alternative platforms. In particular, "middleware" platforms allow software developers to write programs (such as word processors) that interface with the middleware rather than the underlying operating system. A middleware product written for Windows could thus "take over some or all of Windows's valuable platform functions – that is, developers might begin to rely upon APIs exposed by the middleware for basic routines rather than relying upon the API set included in

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[1] Microsoft also maintains monopoly market shares of more than 80% in the word processing and spreadsheet software markets, which it attained in part due to its operating system monopoly.

Windows." *Id.* at 53. Microsoft identified internet browsers such as Netscape Navigator (used in conjunction with a programming language called Java) as serious middleware threats to its operating software monopoly. *See id.* at 53, 74.[2]

Because internet browsers and Java can overcome incompatibility among different operating systems, they threaten to eliminate the key applications barrier to entry protecting Microsoft's operating software market share:

> If a consumer could have access to the applications he desired – regardless of the operating system he uses – simply by installing a particular browser on his computer, then he would no longer feel compelled to select Windows in order to have access to those applications; he could select an operating system other than Windows based solely upon its quality and price. In other words, the market for operating systems would be competitive.

Id. at 60. Microsoft therefore sought to establish the predominance of its own internet browser, Internet Explorer, by "prevent[ing] OEMs from promoting both rival browsers and IAPs [Internet Access Providers] that might use rivals' browsers." *Id.* at 62.

2. These same threats to Microsoft's monopolies have also threatened the OEM defendants – Compaq, Dell, and PB. Microsoft distributes its operating software primarily through installation on PCs sold by computer makers. In 1997, 87.6% of all copies of Microsoft's Windows operating software were installed by PC manufacturers. *See* C.A. App. 109-10, 473-74. During the relevant period, Compaq, Dell, and PB were the three largest PC makers

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[2] As Gravity alleged, competing middleware platforms also threaten Microsoft's monopolies in word processing and spreadsheet software, as these platforms affect Microsoft's ability to exclude competition by retaining control over the interface between applications software and the operating system. *See* C.A. App. 137, 500-01.

and were among the largest distributors of Microsoft's products. *See id.* at 114, 478.

Anticompetitive Restrictions. Gravity alleged that Microsoft and the OEM defendants, to advance their common self-interest (as the manufacturer and its largest distributors), violated Sherman Act §§ 1 and 2 by entering conspiracies to exclude competition and to protect Microsoft's monopolies in the relevant software markets. As recounted by the panel majority, those agreements consisted of "(1) a prohibition against removing icons, folders, or Start menu entries from the Windows desktop; (2) a prohibition against modifying the initial Windows boot sequence; (3) the integration of Internet Explorer (IE), Microsoft's Internet browser software, and other application software with Microsoft's operating software; and (4) the inclusion of long-term distribution contracts, exclusive dealing distribution arrangements, and per-processor license fees." Pet. App. 3a.[3]

The D.C. Circuit specifically condemned the first two restrictions listed above in the government's case against Microsoft. Employing the rule of reason applicable here to Gravity's § 1 claim, the court held that they were "anticompetitive" and "unredeemed by any legitimate justification," and therefore supported a finding against Microsoft of exclusionary conduct in violation of § 2. *Microsoft*, 253 F.3d at 59, 61, 64. The court held that the "anticompetitive effect of the license restrictions is, as Microsoft itself recognizes, that OEMs are not able to promote rival browsers, which keeps developers focused upon the APIs in Windows." *Id.* at 62; *see also* Pet. App. 6a-7a.

Benefits Received. In exchange for agreeing to Microsoft's restrictive licensing provisions, the OEM defendants received various benefits, including monetary discounts

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[3] Gravity proposed two classes, one for United States purchasers of Microsoft operating software installed on a personal computer and sold by one of the OEM defendants, the other for Microsoft word processing and spreadsheet software purchased and sold in the same way. *See* Pet. App. 2a-3a.

on software, greater cooperation from Microsoft in product development, the ability to sell more computer hardware than they would have sold if the software markets were competitive, and assurance that they would not be undercut by rivals offering either comparable hardware with lower-priced software or comparable hardware without software. *See* Pet. App. 3a-4a; *see also Microsoft Findings of Fact*, 84 F. Supp. 2d at 27 (¶ 64) ("Among the five largest OEMs, Gateway and IBM, which in various ways have resisted Microsoft's efforts to enlist them in its efforts to preserve the applications barrier to entry, pay higher prices than Compaq, Dell, and Hewlett-Packard, which have pursued less contentious relationships with Microsoft."); *id.* at 42 (¶ 129) ("Compaq and a handful of other OEMs enjoyed" "early access to Windows source code").

3. Gravity filed this consumer class action in the United States District Court for the District of Columbia in February 1999, and filed its First Amended Complaint ("FAC") as of right in March 1999. C.A. App. 101-49. The Judicial Panel on Multidistrict Litigation transferred the case to the United States District Court for the District of Maryland, where it was coordinated with approximately 64 other antitrust actions against Microsoft. The other actions were consolidated into a single class action, while Gravity's case was kept separate because it was the only complaint alleging claims against OEMs as defendants. Pet. App. 4a.

In January 2001, the district court granted defendants' motions to dismiss the FAC.[4] The court held that Gravity's §§ 1 and 2 allegations of a single conspiracy failed because they established only "a 'spokes of the wheel' conspiracy with Microsoft at the hub but no rim discernible to the naked eye," *id.* at 54a, despite the fact that the complaint alleges that the OEM defendants entered their anticompetitive agreements with Microsoft having

[4] In actuality, an individual, non-class claim remained, but it was subsequently dismissed with prejudice by Gravity and is not relevant to this petition. *See* C.A. App. 643.

knowledge that other of their OEM competitors were doing the same in an interdependent fashion.[5]

Gravity then moved to file a Second Amended Complaint ("SAC"), alleging that Compaq and Dell each entered into separate, bilateral combinations by way of contracts and other actions in concert with Microsoft to restrain trade unreasonably and to maintain Microsoft's monopolies. *See id.* at 5a.[6] The district court denied that motion as futile because "the damages claimed by plaintiffs cannot be said to have been caused by any single section 1 conspiracy between Microsoft and either Compaq or Dell," *id.* at 60a – despite the fact that those combinations were each, at the very least, material causes of the damages of Compaq and Dell customers represented by the proposed classes. The district court also held that *Illinois Brick*'s indirect purchaser rule barred Gravity's damage claims, despite the fact that plaintiffs were direct purchasers from the conspiracy. *Id.* at 60a-64a.

4. A divided panel of the Fourth Circuit affirmed. *Id.* at 1a-45a. The majority first found Gravity's hub-and-spoke theory in the FAC precluded by *Kotteakos v. United States*, 328 U.S. 750 (1946). *See* Pet. App. 9a-11a. The dissent reasoned that Gravity had set out a viable theory "consistent with well-established interpretations of the Sherman Act." *Id.* at 34a.

The panel majority also affirmed dismissal of the SAC's alternative allegation of two bilateral conspiracies be-

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[5] The district court also held that the alleged § 1 conspiracy "coalesced" with the alleged § 2 conspiracy, and therefore would have to meet the more stringent § 2 standard of specific intent. Pet. App. 48a-49a; *see id.* at 8a. The court of appeals correctly reversed this holding, because "[a] § 1 violation 'is legally distinct from that under § 2 . . . though the two sections overlap in the sense that a monopoly under § 2 is a species of trade restraint under § 1.'" *Id.* (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)).

[6] Gravity did not allege a bilateral conspiracy between Microsoft and PB because neither class representative purchased computers and software directly from PB.

tween Microsoft and Compaq, and Microsoft and Dell. The decision held that Gravity had not demonstrated anticompetitive effect by alleging the OEMs' individual market shares in the *computer* market, *id.* at 11a-27a, despite the fact that Gravity's allegations concern only *software* markets. In a footnote, the panel added that this holding also applied to Gravity's allegations in the FAC of a single conspiracy. *Id.* at 11a n.13. The dissent, on the other hand, concluded that "there is no question that Gravity's pleadings are more than adequate" under this Court's recent pronouncement on notice pleading in *Swierkiewicz*. *Id.* at 35a; *see id.* at 35a-41a. Moreover, "[t]he OEMs' specific market power in the PC market is, at best, a subsidiary fact" because "Microsoft is an adjudicated monopolist, with clear market power in the relevant *software* markets, and the defendant OEMs are among the largest players in the PC hardware market." *Id.* at 39a (emphasis added). In the dissent's view, the majority was not free to "misunderstand[] Gravity's argument regarding market power." *Id.* at 38a.[7]

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[7] The panel majority correctly rejected defendants' claims that Gravity had failed under § 1 to describe "'a unity of purpose or a common design and understanding'" between the OEM defendants and Microsoft, holding that "Gravity has sufficiently alleged that Microsoft and the OEM Defendants pooled their resources, rights, or economic power." Pet. App. 12a (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). The majority likewise rejected the claim that conspiring with Microsoft would have been against the OEM defendants' self-interest, in view of Gravity's § 1 allegations that they "received financial and other benefits in exchange for entering into the licensing agreements." *Id.* The majority further noted that "'the "combination or conspiracy" element of a section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion.' . . . The co-conspirators need not share the same motive or goal; it is sufficient to allege that the co-conspirators 'acquiesc[ed] in an illegal scheme.'" *Id.* at 13a (quoting, in turn, *MCM Partners, Inc. v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 973 (7th Cir. 1995), and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948)).

Finally, the panel majority held that Gravity's damage claims[8] were precluded by the indirect purchaser rule of *Illinois Brick*. *Id.* at 27a-32a. The dissent reasoned that the majority had entirely misapplied this Court's deterrence rational from *Illinois Brick*, and accordingly would have followed the unanimous authority from three other circuits (including decisions by Judges Posner and Easterbrook) holding *Illinois Brick* simply inapplicable to vertical conspiracy claims. *Id.* at 41a-45a.

Gravity timely filed a petition for rehearing and rehearing en banc, which was denied on December 19, 2002. Pet. App. 65a.

REASONS FOR GRANTING THE PETITION

I. THE PANEL MAJORITY'S REJECTION OF GRAVITY'S HUB-AND-SPOKE THEORY CONFLICTS WITH DECISIONS FROM THE SIXTH AND EIGHTH CIRCUITS AND THIS COURT

Gravity's FAC alleged a single hub-and-spoke conspiracy with Microsoft at the hub and the three OEM defendants as spokes on the rim. Each OEM defendant entered a separate vertical agreement with Microsoft to harm competition, and each was aware that it was part of a larger scheme including other OEMs. The panel majority disregarded fundamental principles of antitrust conspiracy law set out by other circuits and this Court in holding that the OEM defendants' alleged knowledge that they were part of a broader anticompetitive scheme was insufficient to link them, as a matter of law, in a single conspiracy. There is no legal requirement that the OEMs along the rim of the conspiracy actually met or expressly agreed with one another.

As explained by the Sixth and Eighth Circuits, to establish a hub-and-spoke antitrust conspiracy, the plaintiff must show:

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[8] "*Illinois Brick*'s indirect purchaser rule, when applicable, bars only compensatory damages relief and does not apply to injunctive relief." Pet. App. 28a n.24.

> (1) that there is an overall-unlawful plan or "common design" in existence;
>
> (2) that *knowledge that others must be involved* is inferable to each member because of his knowledge of the unlawful nature of the subject of the conspiracy[,] but knowledge on the part of each member of the exact scope of the operation or the number of people involved is not required; and
>
> (3) there must be a showing of each alleged member's participation.

Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 146 (6th Cir. 1972) (emphasis added and deleted); *Impro Prods., Inc. v. Herrick*, 715 F.2d 1267, 1279 (8th Cir. 1983) (quoting *Elder-Beerman*).

The panel majority flatly rejected the Sixth and Eighth Circuits' standard, erroneously concluding that "[n]othing in the Supreme Court's holding in *Kotteakos* . . . suggests that such a proposition is correct or permissible." Pet. App. 11a. "[A] wheel without a rim is not a single conspiracy." *Id.* The panel majority defined "[a] rimless wheel conspiracy [as] one in which various defendants enter into separate agreements with a common defendant, but where the defendants have *no connection with one another*, other than the common defendant's involvement in each transaction." *Id.* at 9a (emphasis added).

But the court's convenient shorthand, "rimless wheel," is a conclusion masquerading as reasoning. Gravity's allegation is *not* that the OEMs had "no connection with one another." To the contrary: "The critical difference between the test Gravity urges, and the test *Kotteakos* rejected lies in the requirement 'that knowledge that others must be involved is inferable to each member because of his knowledge *of the unlawful nature of the subject of the conspiracy*.'" Dissent, *id.* at 34a (quoting *Impro*, 715 F.2d at 1279). That knowledge is what connects the spokes of the rim, whether or not the OEM defendants ever met or expressly agreed with each other. "Gravity has alleged that the nature of the conspiracy, by design

and by necessity, was broader than any one agreement between Microsoft and an OEM, and that knowledge of that interdependent design was inferable to each member of the conspiracy." *Id.*

These allegations of a single conspiracy fall comfortably within settled principles of conspirator liability that the panel majority inexplicably rejected outright. In straining to reject Gravity's claims, the majority reached a decision that squarely conflicts with this Court's holding in *Blumenthal v. United States*, 332 U.S. 539 (1947), which distinguished *Kotteakos* (one year after deciding it). In *Blumenthal*, the Court held that three distributors – who did not even know each other – joined a *single* conspiracy with the seller at the hub of the conspiracy:

> [T]he salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, *joined together by their knowledge of its essential features and broad scope*, though not of its exact limits, and by their common single goal.

Id. at 558 (emphasis added).

Blumenthal is thus indistinguishable from Gravity's allegation that the OEM defendants knew or should have known that others were involved in the conspiracy orchestrated by Microsoft, and thereby joined it. The majority fundamentally erred in rejecting the principle that Microsoft's co-conspirators are liable if they assented with knowledge they were joining a broader scheme and thus formed a single conspiracy including other OEMs. "It takes no stretch of logic to infer that the OEMs knew that Microsoft's plans contemplated the cooperation of other OEMs. It is the agreement to participate in this common

plan that formed a single conspiracy." Dissent, Pet. App. 35a.[9]

The panel majority's decision likewise conflicts irreconcilably with this Court's controlling precedent specifically applying the same conspiracy principles in the antitrust context. As the Court has long held, there need not be any express agreement between every conspirator in order for a single antitrust conspiracy to be formed. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) ("Here, as in Interstate Circuit, . . . [i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.") (internal quotation marks omitted).

Gravity's reliance on these cases – which the decision below does not distinguish or even cite – firmly grounded its claims in uncontroversial Sherman Act principles, and the decision below fundamentally disregarded these controlling precedents. *See* Dissent, Pet. App. 35a. The Court should grant review to resolve the conflicts that the panel majority's gross misapplication of antitrust conspiracy law created with regard to a hub-and-spoke conspiracy. Until now, "[t]he law has been clear that there need

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[9] It is no answer to say, as defendants might, that the court of appeals' error was due to the fact that *Blumenthal* was not cited by any of the parties in the briefs filed before the panel majority decided this appeal. The same absence of citation applies to *Kotteakos*, for the defendants had never relied on it, and correctly so; the panel majority chose to commit that serious error on its own. In its petition for rehearing and rehearing en banc, Gravity pointed out the panel majority's mistake in detail, along with the irreconcilable conflict that it created with *Blumenthal*. In response, however, the panel majority stuck with its original flawed decision and denied rehearing by a vote of 2-1.

not be an express agreement between every conspirator in order for a single conspiracy to be formed." *Id.* at 34a.

II. THE PANEL MAJORITY'S DECISION CONTRAVENES THIS COURT'S RECENT NOTICE PLEADING PRONOUNCEMENT

The panel majority erroneously rejected Gravity's bilateral conspiracy claims in the SAC because it had not alleged "facts demonstrating Compaq's or Dell's power or share in the PC market," which the majority considered necessary to show an anticompetitive effect in the relevant software markets. Pet. App. 23a. It added that this holding also applied to Gravity's allegations of a single, hub-and-spoke conspiracy in the FAC. *See id.* at 11a n.13. As the dissent explained, "[t]he majority's pleading standard conflicts with the Supreme Court's recent pronouncement on federal pleading requirements." *Id.* at 36a. "[U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case." *Swierkiewicz*, 122 S. Ct. at 997.

In *Swierkiewicz*, this Court reaffirmed that Federal Rule of Civil Procedure 8 requires only that the complaint "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Id.* at 998 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Given the Federal Rules' simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* (internal quotation marks and alteration omitted).

The majority first erred by failing to credit the complaints' reliance on Microsoft's and its co-conspirators' combined market power in the relevant *software* markets. Instead, the majority required Gravity to dismember the conspiracy and plead the OEM defendants' power alone in the PC market. As the dissent correctly understood, "the relevant market is software, and the relevant entity is the conspiracy (either a bilateral or single conspiracy)." Pet. App. 38a. "The OEMs' specific market power in the PC

market is, at best, a subsidiary fact" because "Microsoft is an adjudicated monopolist, with clear market power in the relevant software markets, and the defendant OEMs are among the largest players in the PC hardware market. There is simply no conceivable argument from which one could conclude, based solely on a failure to plead market share, that the defendants are not on notice of the claims against them and the grounds on which they rest." *Id.* at 39a; *see also id.* at 38a ("The Court finds Gravity's allegations of market power deficient, but only because it misunderstands Gravity's argument regarding market power.").

Having erroneously interjected the PC market into this case, the panel majority further disregarded *Swierkiewicz* by demanding evidentiary (rather than notice) pleading of the OEM defendants' PC market power in order to show that they alone could cause anticompetitive effects in the relevant software markets. In *Swierkiewicz*, both lower courts had held that a plaintiff asserting discrimination claims must plead a prima facie case under the familiar *McDonnell Douglas*[10] framework in order to survive a motion to dismiss. But the Court unanimously rejected that proposition because "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." 122 S. Ct. at 997.

So too with the *evidentiary* rule of reason standard applicable to Gravity's claims. "While anticompetitive effect is often proven through analysis of the relevant market definition and market power, it can also be proven through *actual* anticompetitive effects." Dissent, Pet. App. 37a; *see FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the

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[10] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (quoting VII Phillip Areeda, *Antitrust Law* § 1511, at 429 (1986)).

Swierkiewicz makes crystal clear that the majority's pleading requirement is an evidentiary standard relying on circumstantial evidence of market power. Plaintiffs need not, however, plead a circumstantial case, because "discovery might uncover such direct evidence." 122 S. Ct. at 997 ("It . . . seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.").

In any case, Gravity has alleged facts demonstrating an actual anticompetitive effect on the relevant software markets at issue here. As the majority noted, Gravity alleged that Microsoft willingly parted with some of its monopoly profits by giving Compaq, Dell, and PB discounts and other substantial benefits. *See* Pet. App. 3a-4a. That it was willing to pay such a premium strongly indicates that, in Microsoft's view, each OEM defendant significantly contributed to the success of the exclusionary schemes that injured consumers who bought from these OEMs. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 615 (7th Cir. 1997) ("[F]irms may transform monopoly profits into costs in their efforts to engross a larger share of them."); *Microsoft Findings of Fact*, 84 F. Supp. 2d at 27 (¶ 64) ("[Microsoft] charges different OEMs different prices for Windows, depending on the degree to which the individual OEMs comply with Microsoft's wishes.").

This material fact plainly suggests that the alleged agreements between Microsoft and the OEM defendants, whether viewed together or separately, had actual anticompetitive effects on software markets. As this Court has held, all plaintiffs have to show is that the alleged single or bilateral *conspiracies* – not the individual actors – were a material contributing cause of consumer harm. And that contributing cause need not be the sole cause:

> [Plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act [15 U.S.C. § 15] is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this *minimum point* goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) (emphasis added in part); *see also Allied Accessories & Auto Parts Co. v. General Motors Corp.*, 825 F.2d 971, 973 (6th Cir. 1987) (plaintiff need not show that defendants' conduct "was the *sole* cause of" plaintiff's damages). The panel majority was therefore wrong to require a showing that each OEM defendant alone "has forced, or is likely to be able to force, supra-competitive prices on consumers for undesirable software features." Pet. App. 18a.

Indeed, if plaintiffs were required to surmount the court's hurdle that Microsoft's agreement with each OEM defendant had the suppressive effects that plaintiffs allege, then much anticompetitive conduct would become untouchable. As in this case, Microsoft could conspire with a number of OEMs, yet none of those combinations would be actionable merely because the anticompetitive conduct – though necessary to stifle middleware – was not sufficient in and of itself to cause the entire consumer harm.

The Court should grant review to make clear that, under the notice pleading standard reaffirmed in *Swierkiewicz*, courts are not free to fashion their own relevant markets and impose evidentiary pleading standards concerning market power and anticompetitive effect. "A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

Swierkiewicz, 122 S. Ct. at 999 (internal quotation marks omitted).

III. THE JUDGMENT BELOW CONFLICTS WITH PRECEDENT FROM THREE OTHER CIRCUITS HOLDING *ILLINOIS BRICK* INAPPLICABLE TO CONSPIRACY CLAIMS AND MISCONSTRUES AND UNDERMINES THIS COURT'S DECISION IN *ILLINOIS BRICK*

In *Illinois Brick*, the Court ruled that purchasers of goods generally may not bring federal antitrust damage claims against a manufacturer where they bought the manufacturer's goods indirectly through an intermediary. *See* 431 U.S. at 736-48 (interpreting § 4 of the Clayton Act, 15 U.S.C. § 15). The defendants in *Illinois Brick* sold bricks to masonry contractors at allegedly inflated prices, and the contractors in turn "passed on" some or all of those overcharges to the plaintiffs who purchased their constructed buildings. *See id.* at 726. The Court's holding that the plaintiff indirect purchasers could not sue was a logical corollary to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which held that a defendant cannot escape antitrust liability by showing that the plaintiff (direct purchaser) had passed on the anticompetitive overcharge to its customers (indirect purchasers) and was therefore not harmed.

In *Illinois Brick* (as in *Hanover Shoe*), there was no allegation that the direct purchasers were co-conspirators with the manufacturer. On the necessarily implicit assumption that the direct purchaser intermediaries were innocent of wrongdoing, the Court reasoned that, even though indirect purchasers may be injured, two reasons counseled against permitting them to sue the upstream seller. First, there would be a danger of multiple, "overlapping recoveries" against the original seller by both direct and indirect purchasers. *Illinois Brick*, 431 U.S. at 730-31. Second, the Court was concerned about "evidentiary complexities and uncertainties" (*id.* at 732) in determining the amount of any overcharge passed through

by the intermediary to the indirect purchaser. *See id.* at 728-33, 740-46.

The Court made crystal clear, however, that it only established these two factors in order to provide maximum deterrence of antitrust violations. Thus, in the context of that non-conspiracy case, "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws" called for a rule "under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge." *Id.* at 745-46. "[T]he legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Id.* at 746.

A. The Judgment Below Conflicts with Precedent from Three Circuits

The Court should grant review to clarify that the indirect purchaser rule of *Illinois Brick* does not apply to allegations of a conspiracy. Here, Gravity was the *direct* purchaser from the conspiracy, and the *in*direct purchaser rule is simply inapplicable. The Seventh, Ninth, and Eleventh Circuits have each held that *Illinois Brick* does not preclude claims against vertical co-conspirators (and four other circuits have suggested the same). "The first buyer from a conspirator is the right party to sue." *Paper Sys., Inc. v. Nippon Paper Indus Co.*, 281 F.3d 629, 631 (7th Cir. 2002) (Easterbrook, J.); *see also Lowell v. American Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999) ("*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution."); *Brand Name Prescription Drugs*, 123 F.3d at 604 ("[A]ny indirect-purchaser defense would go by the board, since the [plaintiffs] would then be direct purchasers from the conspirators.") (Posner, C.J.); *Arizona v. Shamrock Foods Co.*, 729

F.2d 1208, 1212-14 (9th Cir. 1984); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980).[11]

The panel majority purported to distinguish these cases on the ground that their reasoning should be limited to price-fixing. *See* Pet. App. 30a-31a. But not one of those decisions limited its holding to a price-fixing conspiracy. Judge Easterbrook has explained broadly that "[t]he right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick*, but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages." *Paper Sys.*, 281 F.3d at 632. And a damage calculation need not be mechanically based on an agreement to set a specific price: "[If] the amount of the overcharge . . . cannot be established in any other way (for example, by the conspirators' own agreement) then it is necessary to determine the elasticities of supply and demand. But this prospect is present in every cartel case; it is not occasioned solely by the presence of intermediaries." *Id.* at 633. And Judge Posner has likewise held that "any indirect-purchaser defense would go by the board, since the [plaintiffs] would then be direct purchasers from the conspirators." *Brand Name Prescription Drugs*, 123 F.3d at 604. Indeed, *Fontana* held *Illinois Brick* inapplicable to a multifaceted conspiracy that included a combination of antitrust violations not limited to pricing. *See* 617 F.2d at 481. That is not surprising. In view of the deterrence rationale on which the indirect purchaser rule is grounded, the majority's price-fixing distinction makes no sense.

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[11] *Cf. Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998) (noting exception but finding no conspiracy allegation); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) (noting exception but declining to apply it because the upstream suppliers were not joined as defendants); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979) (same); *Jewish Hosp. Ass'n v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 977 (6th Cir. 1980) (noting exception but declining to apply it because vertical conspiracy allegations failed).

B. The Judgment Below Undermines the Deterrence Value on Which *Illinois Brick* Is Grounded

1. It is critical to understand that this Court grounded its decisions in *Illinois Brick* and *Hanover Shoe* on the understanding that the indirect purchaser rule would provide maximum deterrence and that the multiple-recovery and price-tracing concerns function only to serve this overarching purpose. The panel majority conceded as much in noting this Court's observation that indirect purchasers normally "'would have only a tiny stake' in enforcing the anti-trust law." Pet. App. 28a (quoting *Hanover Shoe*, 392 U.S. at 494). "In consequence," this Court explained in *Hanover Shoe*, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." 392 U.S. at 494. In *Illinois Brick*, the Court likewise concluded that "the long-standing policy of encouraging vigorous private enforcement of the antitrust laws . . . supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge." 431 U.S. at 745-46 (citation omitted). As the Court later confirmed, "*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery . . . would result in no one plaintiff having a sufficient incentive to sue." *California v. ARC Am. Corp.*, 490 U.S. 93, 104 (1989); *see also Paper Sys.*, 281 F.3d at 633 ("It is better, the Court held in both *Illinois Brick* and [*Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990)], to avoid these complications and concentrate damages in the hands of the initial purchasers so as to maximize deterrence.").

This fundamental deterrence rationale for the indirect purchaser bar obviously fails once the intermediary "direct" purchaser becomes party to an antitrust violation. The co-conspiring intermediary has far less, and perhaps

no, incentive to sue its co-conspirator. As Professor Hovenkamp recently noted:

> The principal direct purchasers of the Windows operating system are [OEMs]. They have a complex, ongoing relationship with Microsoft and are also among the *biggest beneficiaries* of many of its practices. Because Microsoft continually issues new versions of Windows and withdraws support for older ones, computer users must frequently upgrade computers long before their operating life is over, even though many users have little need for the greater speed and sophistication of new machines. Because most end users cannot obtain damages and OEMs lack the proper incentives to sue, it is likely that few people will recover damages from Microsoft.

Herbert Hovenkamp, Book Review, *The Rationalization of Antitrust*, 116 Harv. L. Rev. 917, 941-42 (2003) (emphasis added).

Once these "biggest beneficiaries" of the exclusionary scheme become co-conspirators with Microsoft, it is fatuous to suggest that they are the best positioned to effect "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under [Clayton Act] § 4." *Illinois Brick*, 431 U.S. at 746 (internal quotation marks omitted). Neither *Illinois Brick* nor *Hanover Shoe* involved an alleged conspiracy between the manufacturer and its distributor, and the panel majority's decision below obliterates the critical deterrence goal underpinning those cases. As the dissent cogently recognized, denying co-conspirators the protection of *Illinois Brick* "maximizes deterrence by giving the right to sue to the plaintiff with the most incentive to sue." Pet. App. 43a.[12]

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[12] The panel majority noted that *Illinois Brick* "expressly contemplated two exceptions to the indirect purchaser rule: (1) where the indirect purchaser acquired goods through a preexisting cost-plus contract and (2) 'where the direct purchaser is owned or controlled by its customer.'" Pet. App. 29a (quoting *Illinois Brick*, 431 U.S. at 736 n.16). It then asserted that this Court had "cautioned lower federal

2. The panel majority thus erred in discarding this Court's overarching deterrence rationale and mechanically applying the two *Illinois Brick* factors to this conspiracy case. First, the panel majority tersely concluded that *Illinois Brick*'s price-tracing concern was applicable because, "to calculate the 'but-for' price [that would have prevailed absent the conspiracy], the court would be required to determine the over-charge, if any, for Microsoft's software that was passed on to consumers – the exact analysis that *Illinois Brick* forbids." Pet. App. 31a. Even if the panel majority's unfounded conclusion were correct, *Illinois Brick*'s price-tracing concern must be deemed inapplicable in view of the failure of the indirect purchaser rule to provide adequate antitrust deterrence where the so-called direct purchaser has joined an antitrust conspiracy.

In any case, contrary to the panel majority's unreasoned conclusion, no pass-through analysis is necessary or appropriate here, and the court did not (because it could not) explain how that could be so. The reason that the (non-conspiracy) claim in *Illinois Brick* would have required a pass-through analysis was to *allocate* the damages between the direct and indirect purchasers – neither of which was in cahoots with the upstream supplier. In an antitrust conspiracy, however, there can be *no* such allocation: the conspirators are jointly and severally liable for *all* damages caused by their unlawful conspiracy, and

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courts against creating new exceptions to the *Illinois Brick* rule" in *UtiliCorp*. *Id.* The Court's rationale for these exceptions is that "market forces have been superseded," *Illinois Brick*, 431 U.S. at 736 n.16, which is exactly the case here. By virtue of the conspiracy, the normal "complex market interactions" between Microsoft and the OEM defendants were "circumvent[ed]," *id.* at 736 – just as when the direct purchaser is owned or controlled by its customer. Notably, none of the decisions declining to apply the indirect purchaser rule read *UtiliCorp* in this way. To the contrary, Judge Easterbrook recently wrote for the Seventh Circuit that holding an antitrust conspiracy outside *Illinois Brick*, and thus holding each conspirator jointly and severally liable for the conspiracy's entire sales, "is compatible with . . . *UtiliCorp*." *Paper Sys.*, 281 F.3d at 633.

plaintiffs are direct purchasers from the conspiracy. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (holding that there is no right of contribution among antitrust co-conspirators); *Paper Sys.*, 281 F.3d at 632-33 ("Holding [one conspirator] jointly and severally liable with the other[s], for the conspiracy's entire sales, is compatible with *Hanover Shoe*, *Illinois Brick*, and *Utili-Corp*. Certainly it does not undermine these decisions, which are themselves designed to improve deterrence").

As the dissent pointed out, "[h]ow much of its monopoly profits Microsoft retained is merely a matter of how the conspirators allocated the fruits of their alleged illegality, and is not directly relevant to Gravity. The damages that Gravity is seeking to prove are the difference between the price consumers actually paid for the Windows software and the 'but for' price." Pet. App. 43a. "Gravity is not complaining about any overcharge paid by the OEMs to Microsoft. Rather, Gravity is complaining about the conspiracy's ultimate overcharge of the consumer." *Id.*

To be sure, calculating the "but for" price in the absence of the unlawful agreements between the OEM defendants and Microsoft may present certain difficulties. For example, defendants have steadily relied on the fact that doing so will require disaggregating the sale price of Microsoft software from the sale price of the OEMs' computers on which it was installed. But that is no concern of *Illinois Brick* and would occur, for example, if Microsoft built and sold its own brand of Windows-operated PC. *See id.* at 43a-44a. Uncertainties or difficulties in ascertaining damages resulting from the defendants' misconduct do not preclude recovery in an antitrust action. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("[I]n cases where a wrongdoer has incorporated the subject of a plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, . . . this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to

show in what proportions he and the defendant have contributed to the profits."); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) ("[I]t does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.") (internal quotation marks omitted).

"The real concern of *Hanover Shoe* and *Illinois Brick* is the complexity of measuring the pass-on of an *actual* overcharge, and its potential negative effect on deterrence and compensation, not the mere difficulties of determining what the price would have been in a competitive market." Dissent, Pet. App. 44a. Every antitrust suit confronts that problem because the plaintiff must show how far the defendant suppressed competition. The majority's reasoning "is essentially a free pass to any conspiracy that can make the damage it inflicts difficult to pin down." *Id.* at 44a-45a.

Accordingly, the panel majority's mechanical application of the price-tracing concern is both wrong on its own terms and divorced from the non-conspiracy context that spawned it. Attempting to sidestep that problem with its reasoning, the panel majority conjured up a fear that "the *Illinois Brick* rule would be inverted solely based upon artful pleading." *Id.* at 30a. But such hypothetical abuses of pleading rules – which may of course be sanctioned under Federal Rule of Civil Procedure 11 – provide no support for the panel majority's "troubling [and] unhesitating willingness to cut off compensation to *all* injured consumers. . . . Moreover, the concern about 'artful pleading' has nothing whatsoever to do with *Illinois Brick* and *Hanover Shoe*. The direct purchaser rule is designed to *encourage* and *incentivize* private enforcement of the antitrust laws, not immunize corporate wrongdoers from having to litigate antitrust claims." Dissent, *id.* at 45a.

The panel majority also held that the multiple-recovery concern of *Illinois Brick* is present because the OEMs might have sued Microsoft. *See id.* at 31a. (They did not.) *Illinois Brick* held that the antitrust laws are better

served by allowing the direct purchaser to sue, *see* 431 U.S. at 746, but that deterrence rationale fails once the "direct" purchaser joins a conspiracy; at that point, the direct purchaser becomes the consumer who buys directly from any member of the conspiracy. It makes no sense to apply *Illinois Brick* merely because a co-conspirator conceivably might have sued its partner in anticompetitive conduct. Such a rule would only encourage suppliers and distributors to conspire with each other and thereby create immunity – precisely the opposite of the deterrence that *Illinois Brick* sought to achieve.[13] In any case, because there is no right of contribution among antitrust co-conspirators, there could be no double recovery from Microsoft by the OEMs. *See Texas Indus.*, 451 U.S. at 639; *Paper Sys.*, 281 F.3d at 632-33; *Lowell*, 177 F.3d at 1230 ("Although Plaintiffs may sue [the manufacturer] alone for the full cost of the conspiracy with the dealers, that is the way antitrust conspiracy liability works and does not go to the kind of duplicative recovery with which *Illinois Brick* was concerned.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[13] Indeed, Compaq and Dell successfully urged the State of Texas not to join the government's suit against Microsoft. *See* Robert W. Hahn, *The Costs of Regulating Microsoft*, 21 Regulation 62, 67 (1998) ("The Texas attorney general . . . investigated Microsoft, but withdrew just before the case was filed as objections were raised by Dell, Compaq, and Computer City – all major Texas computer firms.").

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